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Bristol-Myers Squibb Company
and Pfizer Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SANDRA LAUACHUS, individually, and on behalf of the estate of JENNIE LAUACHUS, deceased; BURNICE GENTRY, an individual; CINDY JACKSON, an individual; JUDY SMITH, an individual; DAVID HILL, individually, and on behalf of the estate of JAMES D. HILL, deceased; FRED EMERY, individually, and on behalf of the estate of SHIRLEY EMERY, deceased; LENA LAFLEUR, individually, and on behalf of the estate of GERVIS LAFLEUR, deceased; RONNIE SEDBERRY, an individual;

Plaintiffs,

v.

MCKESSON CORPORATION, a corporation; BRISTOL-MYERS SQUIBB Company; and PFIZER INC., a corporation; AND DOES 1 THROUGH 100, INCLUSIVE,

Defendants.

CASE NO. 3:17-cv-1286

NOTICE OF REMOVAL BY DEFENDANTS BRISTOL-MYERS SQUIBB COMPANY AND PFIZER INC.

TO THE CLERK OF THE ABOVE-ENTITLED COURT AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendants Bristol-Myers Squibb Company (“BMS”) and Pfizer Inc. (“Pfizer”) (collectively, “Defendants”) remove the above-entitled state court action, Case No. CGC-17-557294, from the Superior Court of the State of California for the County of San Francisco, to the United States District Court for the Northern District of California on the basis of diversity jurisdiction. Plaintiffs Sandra Lauachus (individually and on behalf of the estate of Jennie Lauachus, Burnice Gentry, Cindy Jackson, Judy Smith, David Hill (individually and on behalf of the estate of James D. Hill), Fred Emery (individually and on behalf of the estate of Shirley Emery), Lena Lafleur (individually and on behalf of the estate of Gervis Lafleur), and Ronnie Sedberry are referred to as “Plaintiffs” herein. In support of this Notice of Removal, Defendants state as follows:

I. THE STATE COURT ACTION

The removed action, *Sandra Lauachus, individually, and on behalf of the estate of Jennie Lauachus, deceased, et al. v. McKesson Corp., et al*., was filed on February 27, 2017 in the Superior Court of the State of California for the County of San Francisco and assigned Case No. CGC-17-557294. The allegations in the Complaint relate to the prescription medication Eliquis. The Complaint asserts causes of action for negligence, strict product liability (failure to warn), strict product liability (design and manufacturing defect and failure to warn), breach of express warranty, breach of implied warranty, fraudulent misrepresentation, fraudulent concealment, negligent misrepresentation, and wrongful death. Pursuant to 28 U.S.C. § 1446(a), attached are copies of all state court process, pleadings, and orders served on Defendants in the removed case. (Declaration of Brooke Kim in Support of Notice of Removal by Defendants (“Kim Decl.”), Exhibits Q through R.)

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II. BASIS FOR REMOVAL – DIVERSITY JURISDICTION

This case is properly removed under 28 U.S.C. § 1441 because it is a civil action that falls within the Court's original jurisdiction under 28 U.S.C. § 1332 (diversity of citizenship). The matter in controversy exceeds the sum of $75,000, exclusive of interest and costs, and complete diversity exists between the properly considered plaintiffs and defendants.

III. THE PROCEDURAL REQUIREMENTS FOR REMOVAL ARE SATISFIED.

Plaintiff commenced this action on February 27, 2017, and has not yet served Defendants with the Complaint. This Notice of Removal is therefore timely filed within 30 days of service of the initial pleading on both Defendants. 28 U.S.C. § 1446(b).

Defendants BMS and Pfizer consent to removal. Consent to removal by Defendant McKesson Corporation ("McKesson") is not required because McKesson has been fraudulently joined. *See Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1193 n.1 (9th Cir. 1988) (noting that fraudulently-joined defendants need not join in a removal petition).

Venue is proper in this Court because the United States District Court for the Northern District of California embraces the county in which the state court action is now pending. *See* 28 U.S.C. §§ 1441(a), 84(d).

Pursuant to 28 U.S.C. § 1446(d), Defendants will file in the state court and serve on all parties a Notice to Opposing Party of Notice of Removal and this Notice of Removal.[1]

[1] Nothing in this Notice or related documents shall be interpreted as a waiver or relinquishment of Defendants' right to assert any defense or affirmative matter in this action. If any question arises as to the propriety of removal, Defendants request the opportunity to conduct discovery or brief any disputed issues and to present oral argument in support of their position that this case is properly removable. *See Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998) (stating that "[w]here fraudulent joinder is an issue," courts "will go somewhat further" than the allegations of a complaint, since "[t]he defendant seeking removal to the federal court is entitled to present the facts showing the joinder to be fraudulent").

IV. THE AMOUNT-IN-CONTROVERSY REQUIREMENT IS SATISFIED.

The face of the Complaint alleges claims for which the damages sought will be in excess of $75,000, exclusive of interest and costs, thereby satisfying the amount-in-controversy requirement of diversity jurisdiction. *See* 28 U.S.C. § 1332. Where, as here, a complaint does not specify the amount of damages being sought, a removing party's burden of demonstrating the amount-in-controversy requirement is "easily met" if "it is facially apparent from the allegations in the complaint that plaintiff's claims exceed $75,000." *Kenneth Rothschild Trust v. Morgan Stanley Dean Witter*, 199 F. Supp. 2d 993, 1001 (C.D. Cal. 2002) (citing *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F. 3d 373, 376 (9th Cir. 1997)).

This Complaint was filed on behalf of eight Plaintiffs, four of whom seek damages for wrongful death on behalf of a deceased family member. The remaining Plaintiffs allege that their use of Eliquis caused them to suffer internal and gastrointestinal bleeding that in several cases was severe enough to require hospitalization for 10-14 days. (Compl. ¶¶ 7-14.) Plaintiffs allegedly "suffered and incurred damages, including medical expenses, physical pain and mental anguish, diminished enjoyment of life, loss of life, and loss of earnings, among other damages" as a result of taking Eliquis. (*Id.* at ¶¶ 15, 62, 73, 96.) Plaintiffs further claim that they were "caused to suffer serious and dangerous side effects including, life-threatening bleeding, as well as other severe and personal injuries which are permanent and lasting in nature." (*Id.* at ¶¶ 96, 106, 116, 127, 137, 143.) Plaintiffs seek to recover compensatory damages (pain and suffering, emotional distress, loss of enjoyment of life); statutory and economic damages (including medical expenses, out of pocket expenses, lost earnings); and punitive damages, together with interest, costs of suit, and attorneys' fees. (*Id.* at ¶¶ 153-160.)

Based on any reasonable reading of the Complaint, the severity of the injuries pleaded and breadth of damages sought lead to the inevitable conclusion that Plaintiffs will seek damages exceeding $75,000. As it is facially apparent that the Complaint seeks damages in excess of $75,000, the amount-in-controversy requirement for diversity jurisdiction is satisfied. *See* 28 U.S.C. § 1332.

V. COMPLETE DIVERSITY EXISTS BETWEEN THE PROPERLY CONSIDERED PARTIES.

Plaintiff Sandra Lauachus was a resident of California at all times referenced in the Complaint. (Compl. ¶ 7.) The remaining plaintiffs were residents of Tennessee, Ohio, Kentucky, Pennsylvania and Arizona at all times reference in the Complaint. (*Id.* at ¶¶8-14.) Defendants BMS and Pfizer are both Delaware corporations headquartered in the State of New York. (Compl. ¶¶ 21, 24.) Defendants are, therefore, citizens of Delaware and of New York for purposes of federal diversity jurisdiction. 28 U.S.C. § 1332(c)(1). As Plaintiffs are citizens of California, Tennessee, Ohio, Kentucky, Pennsylvania and Arizona, and Defendants are citizens of Delaware and New York, complete diversity exists between the properly-considered plaintiffs and defendants.

Defendant McKesson's citizenship should be disregarded for the purposes of determining whether diversity exists, as McKesson has been fraudulently joined, and is not a necessary and indispensable party. *Emrich*, 846 F.2d at 1193 n.1.

A. McKesson is Fraudulently Joined.

Plaintiffs include McKesson in this lawsuit solely to defeat diversity jurisdiction; as McKesson is fraudulently joined, its citizenship may be disregarded in assessing subject matter jurisdiction. "[O]ne exception to the requirement of complete diversity is where a non-diverse defendant has been 'fraudulently joined.'" *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001). Joinder is fraudulent "[i]f the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state." *Morris*, 236 F.3d at 1067.

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Here, McKesson is fraudulently joined. The sole charge directed at McKesson is the conclusory allegation that McKesson packaged, marketed, supplied, sold, and distributed Eliquis in California. (Compl., ¶¶ 18-19.) This allegation alone is insufficient to state a cause of action, as Plaintiffs fail to plead facts establishing that McKesson's acts were wrongful or the proximate cause of their injuries.

Beyond this conclusory statement, the Complaint, as drafted, carefully avoids pleading facts that would demonstrate the lack of a claim against McKesson. Plaintiffs conceal the lack of a cause of action against McKesson by referring to all three parties as "Defendants," without distinguishing among them. Considering just the first few allegations Plaintiff attributes to all "defendants," it is apparent that Plaintiffs have employed this tactic to give the illusion of a claim against McKesson, though no such claim is actually alleged.

For example, Plaintiffs contend that "defendants entered into a worldwide collaboration to 'commercialize' apixaban (Eliquis) …." (Compl., ¶ 26.) Though Plaintiffs apparently quote from promotional materials relating to the agreement, they attach neither the promotional materials, nor the agreement, the latter of which would show that McKesson was not party to the agreement. (*See* Kim Decl., Ex. A (BMS press release relating to agreement).) Plaintiffs next claim that "Defendants received FDA approval to market Eliquis in 2012 (NDA 202155)." (Compl., ¶ 35.) But BMS—and not McKesson—obtained approval from FDA to market Eliquis. (Kim Decl., Ex. B (FDA approval letter for Eliquis).) Then, Plaintiffs allege that "defendants" used incompetent Chinese agents to conduct a study called ARISTOTLE, and committed fraud in their conduct of that study. (Compl., ¶¶ 39, 40.) But the ARISTOTLE study was sponsored by BMS, not McKesson. (Kim Decl., Ex. C (ClinicalTrials.gov information on Aristotle study).) Further, Plaintiffs state that "at a February 9, 2012 meeting between the FDA and BMS-Pfizer executives, the FDA is reported to have characterized the conduct of defendants as showing a pattern of inadequate supervision." (Compl., ¶ 41) This allegation, while ascribed to all "defendants," cannot be related to McKesson, which was not involved in the clinical trial which was purportedly inadequately supervised. (*See* Kim Decl., Ex. B.) The Complaint is replete with examples of allegations which have been attributed to all defendants, when it is clear that the allegations could never be attributed to McKesson.

By contrast, McKesson, by name, is hardly mentioned in the Complaint. Aside from sections describing jurisdiction and the parties, the Complaint does not *once* mention McKesson. (Compl. ¶¶ 34-160.) The only facts the Complaint does allege as to McKesson concern its general presence and business activity in California, so as to establish personal jurisdiction. (*Id.* ¶¶ 16-19, 31.) Indeed, McKesson is mentioned in only seven of the 160 paragraphs in the Complaint.

Plaintiffs' allegations against McKesson do not support the contention that McKesson violated the law in any way, much less that it was negligent, is strictly liable, breached warranties, or negligently misrepresented anything with respect to Eliquis, as the Complaint summarily contends. In short, Plaintiffs attribute no specific wrongful act to McKesson. "While Plaintiffs are in no way required to prove their case, by the same token they cannot avoid a finding of fraudulent joinder by asserting a mere hypothetical possibility of a cause of action against the resident defendant." *Higley v. Cessna Aircraft Co.*, No. CV 10–3345–GHK (FMOx), 2010 WL 3184516, at *2 (C.D. Cal. July 21, 2010) (internal quotation marks and brackets omitted).

Plaintiffs have no intention of obtaining a joint judgment against McKesson and Defendants, and their joinder of McKesson is no more than an attempt to avoid removal. Accordingly, McKesson is fraudulently joined. *See AIDS Counseling & Testing Ctrs. v. Group W Television, Inc.*, 903 F.2d 1000, 1003 (4th Cir. 1990) ("a joinder is fraudulent if there is no real intention to get a joint judgment"). Its citizenship should be disregarded for the purposes of determining diversity.

B. McKesson is Not a Necessary and Indispensable Party.

Alternatively, the Court should sever and remand Plaintiffs' claims against McKesson pursuant to Federal Rule of Civil Procedure 21 because McKesson is not a necessary and indispensable party under Federal Rule of Civil Procedure 19. Under Rule 21, district courts may sever and remand claims against unnecessary defendants to perfect diversity jurisdiction. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832 (1989) (stating "it is well-settled that Rule 21 invests district courts with authority to allow a dispensable party to be dropped at any time"). The Ninth Circuit has stated that Rule 21 "is viewed as a grant of discretionary power to the federal court to perfect its diversity jurisdiction by dropping a nondiverse party provided the nondiverse party is not indispensable to the action under Rule 19." *Kirkland v. Legion Ins. Co.*, 343 F.3d 1135, 1142 (9th Cir. 2003) (internal quotation marks and brackets omitted); *accord Koehler v. Dodwell*, 152 F.3d 304, 308 (4th Cir. 1998) ("[A] party or claim whose presence deprives the court of jurisdiction may be dropped or severed from the action.") (citing Fed. R. Civ. P. 21)). Courts may sever claims against even a properly joined party, so long as that party is not necessary and indispensable within the meaning of Rule 19. *See* 4 Moore's Federal Practice § 21.05, at 21-20 to -21 ("[C]ourts agree that the Rule may apply even in the absence of misjoinder or nonjoinder.").

McKesson is not a necessary and indispensable party to this litigation. It is barely the subject of any allegations in the Complaint, and none of the allegations relating to McKesson concerns any wrongdoing with respect to Eliquis. Plaintiffs do not allege that McKesson and Defendants acted in concert; and even if Defendants and McKesson could be held jointly liable for some of Plaintiffs' alleged injuries, that does not make McKesson a necessary and indispensable party, since "[i]t has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit." *Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 7 (1990) (per curiam) (holding that alleged joint tortfeasor physician was not a necessary and indispensable party to products liability action against medical device manufacturer).

VI. CONCLUSION

Accordingly, Defendants respectfully request that this action now pending against Defendants in the Superior Court of the State of California, County of San Francisco, be removed to this Court and that this action be placed upon the docket of this Court for further proceedings as though originally instituted in this Court.[2]

Dated: March 10, 2017

DLA PIPER LLP (US)

By: /s/ Brooke Kim
BROOKE KILLIAN KIM
Attorneys for Defendant Bristol-Myers Squibb Company and Pfizer Inc.

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[2] Plaintiff cites two Eliquis cases in which remand has been ordered. After entry of those orders, however, courts in several other Eliquis cases—thirteen cases in total—have instead determined that the more appropriate course of action is to stay cases, pending transfer to the Eliquis MDL, MDL No. 2753. (Kim Decl., Exs. D-P.) In the Northern District, the transfer of several similarly-situated actions to an MDL warrants reconsideration on the remand issue. Specifically, in the NuvaRing litigation, Judge Alsup initially remanded one NuvaRing case, determining that McKesson was not fraudulently joined in that case. *See Rifenbery v. Organon USA, Inc.*, No. 13–cv–05463–JST, 2014 WL 296955, at *2 (N.D. Cal. Jan. 26, 2014). Subsequently, several NuvaRing cases were tagged for transfer to an MDL proceeding. *Id.* Based on this, Judge Alsup determined that "[c]ircumstances have since changed," and because the MDL court would determine the question of whether McKesson is a proper defendant, all later NuvaRing cases were transferred to the MDL court. *Id.; see also Buyak v. Organon*, No. 3:13-cv-03128-WHA (N.D. Cal. Aug. 14, 2013). Similarly, now that twelve cases presenting the same fraudulent joinder issue have been tagged for transfer to the MDL, a different result is warranted here. Defendants will promptly file a motion to stay this action pending its transfer to the MDL court.